MONTANA
Management View

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Governor proposes $31 million pay package

State employees could receive 3-percent pay raises each year of the 2006-07 biennium if Governor Martz's pay proposal is accepted by major state employee unions. State labor negotiators presented the Governor's pay package to the major state employee unions October 26, 2004. In addition to 3-percent pay raises beginning in October each year, the package includes a 10-percent increase in the state's share of the health insurance premium for each benefit year ($46 beginning January 2006 and $51 beginning January 2007), and continuation of the labor-management training initiative with a separate appropriation of $75,000. The Office of Budget and Program Planning estimates the total cost of Governor Martz's proposal at about $75 million, or $31 million general fund. Union representatives will respond to Governor Martz's proposal November 4, 2004. Any agreement reached between the state and the unions, however, is subject to the legislative approval.

Other pay news...

Compensation advisory committee recommends all state jobs move to broadband pay system

An advisory committee of human resource and budget representatives issued a report this month recommending the State of Montana strive toward a coordinated compensation

Highlights

system covering all executive branch (non-university system) employees. The committee further recommended Montana state government adopt the broadband pay plan as the single pay plan for executive branch positions, and that all positions be moved to the broadband plan by July 1, 2007. The report also contains general statistics on the state workforce, state employee pay and benefits, collective bargaining, and comparisons of total compensation with other employers, and can be viewed at: http://discoveringmontana.com/doa/spd/resources/CompensationPlanning/StateOfPayReport.doc

Wage official urges status quo on overtime exemptions, pending review of state regs

The chief of the state's Labor Standards Bureau in the state Department of Labor and Industry cautions state agencies against changing employees' "non-exempt" overtime status to "exempt" for the time being, despite recent changes to federal overtime requirements. John Andrew told a recent gathering of state human resource representatives the safest route is to maintain the status quo unless or until any changes are mandated by amendments to state administrative rule changes under the authority of Montana's wage and hour statute.

The federal Fair Labor Standards Act does not restrict states from having overtime standards that are more generous to employees than the federal standards. Since Montana has existing regulations that define exemptions from overtime, the higher standards (state or federal) will be applied on questions of overtime exemption. For instance, the federal law has a special provision for exemption of certain computer occupations, while the state law and regulations do not, therefore, the higher Montana standard applies.

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The state labor department could adopt the federal regulations in whole or in part, or continue with the status quo, or seek legislative guidance on how to proceed, Andrew says. All options are under consideration, though legislative guidance may be a preferred route. Andrew says his agency is open to suggested changes to the rules. Information is available at: http://erd.dli.state.mt.us/laborstandard/wagehrlaws.asp

The U.S. Department of Labor has provided two new web sites to assist employers on the federal guidelines. One site provides training on the regulations with fact sheets, charts, and videos: www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm . The other site, the FLSA Overtime Security Advisor, is an interactive tool to help employers and workers get comprehensive and accurate information about the federal rules at: www.dol.gov/elaws/overtime.htm .

Picking a penalty in disciplinary cases:
Arbitrators consider work records and other factors

Picking a penalty for an employee who needs discipline is like tiptoeing across a tightrope between uniformity and individuality. State managers strive to treat employees equitably, but no two employees are exactly alike. This article explains how arbitrators decide whether a particular penalty "fits the crime" in light of an employee's overall work record and service to the employer. (*See the Arbitration Roundup on page **5** of this issue for summaries of state government cases.)*

Arbitrator Carroll Daugherty ruled in the landmark *Enterprise Wire* case that employers may consider an employee's service to the employer when picking a penalty for proven misconduct. Daugherty's ruling in 1966 established the classic "seven tests" of just cause still used by many arbitrators today. At the same time, the employer must be able to show that its rules, policies and directives are enforced even-handedly across the workforce. In other words, discipline cannot be arbitrary, capricious or discriminatory. This balance between uniformity and individuality is delicate. It is also ancient. Aristotle never spent a day in arbitration, yet his words of 2,300 years ago have an "arbitral" ring to them: *"Equality consists of the same treatment of similar people … but the worst form of equality is to try to make unequal things equal."*

Uniformity vs. Individuality

State managers understandably feel tension between the need to enforce a progressive discipline system in a consistent fashion and the need to recognize each individual's work record and service to the employer in selecting a penalty. Arbitrators strike this type of balance:

> *Management must be permitted to exercise its judgment as to the proper discipline to impose as long as it does not discriminate against a particular employee. If progressive or corrective discipline is used, then this method must be applied in all cases (Arbitrator Kesselman; Sperry Rand Corp.; 1969).*

If the employer considers an employee's long and satisfactory service to be a mitigating factor in a disciplinary decision, the employer should be prepared to consider long and satisfactory service to be a mitigating circumstance for all:

> *The employer need not penalize all employees who are guilty of an offense if it is to penalize any of them. However, if the employer is to select some employees for discipline and let others off scot-free (or if it is to impose heavy penalties on some and lighter penalties on others) it must – if it is to meet the standard of just cause – show that its reasons for making such distinctions were sound and just (Arbitrator Seward; Bethlehem Steel Co.; 1957).*

Mitigating Factors vs. Aggravating Factors

The factor that plays the leading role in balancing the need for uniformity against the need to treat employees as individuals is the length and quality of an employee's work record *(Just Cause: The Seven Tests; Koven & Smith; 2nd Edition; p. 394).*

Case law strongly supports the notion that an employer may justifiably impose a lesser penalty on an employee with long, satisfactory service than on an employee whose service is short or whose work record is poor. Arbitrators often presume the employee with long service is capable of satisfactory performance if given the opportunity. An arbitrator also is likely to consider an employee with long service to have a "greater stake" in his or her job, entitling the employee to greater consideration than someone who has been around only a short time and has less to lose *(Arbitrator Cohen; I. Schumann & Co.; 1975)*.

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Arbitrators may lighten a penalty if management neglected to consider mitigating factors such as: provocation; contribution by management to the misconduct; absence of intent to commit serious misconduct; absence of hazards or other aggravating circumstances; language difficulties; and acute personal problems such as chronic alcoholism and mental illness. In regard to alcoholism and drug abuse, however, arbitrators have held that rehabilitative efforts undertaken by an employee after discharge do not constitute a mitigating circumstance. Also, financial difficulties experienced by a discharged grievant and his or her family have been viewed as irrelevant *(Just Cause: The Seven Tests; p. 396)*.

Factors that support a relatively severe penalty -- aggravating factors -- might include: misconduct that was highly dangerous; additional misconduct that compounded the original offense; malicious intent; and lack of truthfulness or failure to cooperate with the employer's investigation.

Conclusion

It is important to remember the employer has two hurdles to clear in a discipline case. First, the employer must prove the employee committed the misconduct as alleged and was afforded due process. Second, the employer must prove the penalty was not excessive in relation to the severity of the violation and the employee's overall work record. This second test can be tricky. Sometimes an arbitrator will agree with management on the fact the employee committed severe misconduct, however, the arbitrator may still modify the penalty. By the time an arbitrator reinstates a discharged employee with back pay, but orders the employee to serve a "severe" 30-day unpaid suspension, the disciplinary suspension may feel meaningless or hollow. It may merely

mean the reinstated employee gets 11 months of back pay instead of 12 months of back pay – not exactly the closure management envisioned when firing the employee.

The employer can improve the integrity of disciplinary actions by thoroughly considering the employee's work record, and by consistently applying this type of consideration in most disciplinary situations. See the Arbitration Roundup below for examples of state government arbitration cases. Give your labor relations representative a call (phone numbers on the last page of this newsletter) if you have any questions.

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Suspension reduced to warning letter for sexual harassment

An arbitrator ruled the suspension of an employee proven to have committed harassment was an excessive and unreasonable penalty, given the employee's six-year satisfactory work record.

The grievant was a janitor employed by state government. Four women who worked in the building where the grievant worked complained to management about behavior that made them uncomfortable. The behavior included: the grievant frequently standing very close to the women; the grievant frequently touching the women; the grievant making frequent comments about their clothing; the grievant looking at their bodies in a manner that made them feel as if he were "mentally undressing" them. All four women said they altered their routines or conditions at work in order to avoid the grievant whenever possible.

Management immediately notified the grievant of the complaints and interviewed him. The grievant essentially acknowledged or admitted to all the alleged incidents, however, he claimed that he didn't realize the behavior was inappropriate or constituted harassment. By all reports, the grievant's objectionable conduct ceased as soon as he was made aware of the complaints.

The agency suspended the grievant for five days without pay for violation of the agency's harassment prevention policy. The union grieved the suspension to arbitration.

Arbitrator Eric Lindauer reduced the suspension to a warning letter. "In determining the appropriate discipline," Lindauer wrote, "this arbitrator takes into consideration the nature of the grievant's conduct, the fact that once he was notified that his conduct was offensive he immediately changed his behavior, and, finally, his excellent six-year record of employment."

Discharge stands for 10-month employee caught sleeping

An arbitrator ruled the state had just cause to discharge a 10-month employee for sleeping on the job, where the employee's primary duty was direct care of developmentally disabled residents, and her work record contained prior warnings for absenteeism.

The grievant's job was to supervise and take care of residents in a state mental health facility. This required interaction with residents at least every five minutes. If an employee was absent or tardy, another employee was required to cover for the absent or tardy employee. In 10 months of employment, the grievant was frequently absent for claimed illness, and was counseled on the need to attend and perform work regularly. When verbal warnings did not inspire her to improve, the grievant subsequently received a one-day suspension without pay.

Shortly thereafter, witness reports came from the grievant's work area alleging the grievant was seen sleeping in a recliner chair near a television. Witnesses said that when a co-worker approached her and yelled, "Wake up!", the grievant opened her eyes and responded, "I'm sorry." She denied she was asleep, claiming her eyes "were heavy" and she was merely resting them for a few minutes. She claimed to be aware of her surroundings at all times.

The employer discharged the grievant for sleeping. The union grieved the discharge to arbitration.

"Because of the nature of the work of a resident care aid, primarily one-on-one care of disabled patients, sleeping on the job is a serious offense. I find the discipline was reasonably related to the seriousness of the offense and the employee's work record."

Arbitrator John Astle said the key Question was, did the degree of Discipline reasonably relate to the seriousness of the offense and the record of the employee? "She had a poor work record for the 10 months she was employed, particularly absenteeism," Astle wrote. "Because of the nature of the work of a resident care aide, primarily the one-on-one care of disabled patients, sleeping on the job is a serious offense. I find the discipline was reasonably related to the seriousness of the offense and the employee's work record."

Five-year good record didn't mitigate proven patient abuse

An arbitrator upheld the discharge of a five-year employee with a good work record for admittedly "banging" a resident's head into a breakfast tray, despite the grievant's claim of mitigating factors.

The grievant was a care aide at a state facility for developmentally disabled residents. For five years he performed satisfactorily and had no discipline in his work record. The incident that triggered his discharged involved the supervision of residents during a breakfast meal. According to witnesses, a male resident attempted to leave the

breakfast table without picking up his food tray. The grievant told the resident to pick up his tray, but the resident did not respond. Witnesses stated the grievant grabbed the resident by the back of the neck and forced him to sit back down at the table. The grievant proceeded to push the resident's face into the food tray.

At first, the grievant denied these actions. He later admitted to them, but claimed the following mitigating factors: he was tired; he was under stress at home and at work; his child was ill; immediately before the incident, another resident was swearing at the grievant; and, management did not provide enough supervisory help in the breakfast area. The employer discharged the grievant for patient abuse. The union grieved the discharge to arbitration.

Arbitrator Eric Lindauer said the grievant's five-year record of good performance could not override the grievant's misconduct. "The evidence before this arbitrator has established that the grievant's actions were intentional, deliberate, and without cause or provocation by the resident," Lindauer wrote. "Notwithstanding the grievant's five years of service and satisfactory work record for the employer, the penalty imposed was consistent with the gravity of the grievant's conduct."

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/css

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